



A BONUS CAN BE A RIGHT

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PEOPLE who have lost their jobs as a result of the current recession might not like it, but as the reports of banking profits last week suggested, bonuses are back. Or in any case, they will be soon. This bonus season, though, PR might dictate that some firms will be tempted to curtail or ban them to assuage politicians and the public. However, businesses might find that slashing bonuses is not as easy as they think. So if you rely on a bonus, what are your rights?

A bonus is any payment on top of an employee's normal salary, often made with the aims of rewarding performance and retaining key staff. Bonuses can be delivered as additional days' holiday, or stock options, but most are cash payments, paid at regular intervals, eg annually, bi-annually or quarterly.

In the financial sector, bonuses tend to be based on a performance target, are usually paid annually, and may also be dependent on the financial performance of the employer.

A one-off or irregular bonus will generally be seen as a gift from the employer (although HMRC will still regard it as "employment income" and require income tax and national insurance contributions to be deducted). In contrast, a formal incentive scheme, under which an employee receives a basic salary, and additional payments dependent on set targets, will generally give the employee a contractual right to the bonus payment, if the performance targets are met.

However, the majority of bonuses are said to be at the discretion of the employer, even if there is a more formal structure in place. This is to give the employer the right not to pay a bonus, for example, due to its financial position.

But although an employer may retain this discretion, employees may still be entitled to a bonus payment in two situations: where a right has arisen through custom and practice; or if the employer has failed to exercise its discretion properly. Simply, if an employer has a practice of making regular bonus payments, employees may have an implied contractual right to the bonus. In one case, the employer withdrew its discretionary bonus scheme without notice. Because employees had not been told that they would not receive a bonus, they still had a "reasonable expectation" that they would receive a bonus for their work.

The courts and tribunals have decided that where a bonus is at the employer's discretion, this must be exercised fairly and in good faith. If performance targets have been reached and an employee is eligible for a bonus, the employer will be acting in bad faith if it simply declines to pay a bonus without due consideration.

A claim for an unpaid bonus may be pursued as a breach of contract claim in the High Court or County Courts, or (if the amount claimed is less than £25,000) in the employment tribunals.

Often, these claims are combined with claims for unfair dismissal and discrimination and attract significant attention in the media. Whether or not current economic conditions will bring an increase in the number of bonus claims remains to be seen.

In any event, public policy on the "bonus culture" may mean that the courts and tribunals will be less inclined to allow claims for bonus payments while many employers are struggling simply to retain their staff.

If an employer has a practice of giving regular bonus payments, an employee might have an implied contractual right to receive one
